IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1837

JOHN ELLIS, JAMES CARTY, JAMES CURLEY, WILLIAM JONES, JAMES CROWN, ROSEBOROUGH MCMILLAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners above named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on March 31, 1979.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, dated March 13, 1979, is not yet reported. A copy of that Opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (App. B, *infra.*) was entered on March 13, 1979. A Petition for Rehearing in Banc was timely filed and denied on April 9, 1979. (App. C, *infra.*) On April 27, 1979, upon consideration of petitioners' Application for Extension of Time to File Petition for Writ of Certiorari, Mr. Justice Brennan extended the time for filing the instant Petition to June 8, 1979. (App. D, *infra.*) This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in a case alleging a single criminal conspiracy, where the only proof of conspiratorial conduct consists of evidence that defendant-police officers were lawfully engaged in the performance of similar, assigned duties in connection with an official criminal investigation, and where there was no evidence of an agreement among all defendants or of a conspiratorial state of mind to violate the federal civil rights of witnesses or suspects, the evidence was sufficient to sustain conspiracy convictions under 18 U.S.C. §241?

2. Whether, where the government's evidence demonstrated, at best, the existence of multiple conspiracies, resulting in a fatal variance between the proof at trial and the single conspiracy charged in the indictment, and where the Court of Appeals ignored this Court's prior conspiracy decisions by employing improper standards of review, petitioners suffered substantial prejudice at both the trial and appellate levels?

3. Whether the government's grant of immunity to two prosecution witnesses upon completion of their direct testimony and during cross examination, not to elicit forthcoming testimony but solely to protect the direct testimony of those witnesses, violated the federal immunity statute, 18 U.S.C. §6001, *et seq.*, and prejudiced petitioners' sixth amendment rights to a fair trial and to confront witnesses against them?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment VI:

In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury . . . and . . . to be confronted with the witnesses against him. . . .

United States Code, Title 18:

§241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

§242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both;

and if death results shall be subject to imprisonment for any term of years or for life.

§6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

At approximately 3:30 A.M. on October 5, 1975, one or more homemade firebombs were thrown at and into the home of an Hispanic-American family named Santiago in Philadelphia, Pennsylvania. Five persons, including a mother and three of her children, were killed. Each of the petitioners, all of whom were homicide detectives in the Philadelphia Police Department, along with numerous other detectives and police officers, were immediately assigned to investigate the murders.

Within an hour of the firebombing, and based upon the statement of an eyewitness, the police arrested one Robert "Reds" Wilkinson. Over the next few hours, and again on the basis of information developed by the police investigation, seven other persons, all neighbors of the Santiagos, were taken to police headquarters for interrogation. Two of those arrested, Wilkinson and Ronald Hanley, confessed to the firebombing and were subsequently convicted. Wilkinson's conviction was later overturned when the eyewitness recanted on his testimony and upon receipt of a confession to the firebombing by David McGinnis, one of the persons questioned by the police on October 5 who, at that time, denied any involvement. In his confession in March of 1976, McGinnis stated that he firebombed the Santiago home with Hanley, but denied any involvement in the firebombing by Wilkinson.[1]

Each of the eight persons who were taken into custody following the firebombing subsequently alleged that they were beaten, harrassed, and threatened during the course of the October 5, 1975 interrogation by

1. McGinnis entered a plea of guilty to federal civil rights violations arising out of the firebombing and was sentenced to 22 years imprisonment. Hanley was convicted on federal charges arising out of the firebombing and received a sentence of life imprisonment plus 35 years, which conviction and sentence are presently under appeal.

various homicide detectives, including the petitioners herein. Thereupon, the United States government charged all of the petitioners with one count of conspiracy to deprive the named individuals of their federal civil rights in violation of Title 18, United States Code, section 241. This same indictment also charged various of the petitioners with substantive violations of the civil rights of these same persons under Title 18, United States Code, section 242. Each of the petitioners was charged in at least one of the substantive counts.[2]

After fourteen (14) days of trial and almost 24 hours of deliberation, the jury announced that it was unable to render a verdict as to Counts II and III. As to Count IV, the substantive count involving petitioners Carty and McMillan, the jury returned a verdict of not guilty. Only as to Count I, the conspiracy count, did the jury find all of the petitioners guilty as charged.

After disposition of post-trial motions, petitioners were each sentenced to a term of fifteen (15) months imprisonment.

An appeal was timely filed with the United States Court of Appeals for the Third Circuit, and, on March 13, 1979, the convictions and sentences were affirmed. A Petition for Rehearing In Banc was subsequently denied, and the instant Petition for a Writ of Certiorari followed.

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2. Count II charged petitioners Ellis, Carty, and Curley with violating the rights of Ronald Hanley; Count III charged petitioners Crown, Jones, and McMillan with violating the rights of Robert Wilkinson; and Count IV charged petitioners Carty and McMillan with violating the rights of David McGinnis.

REASONS FOR GRANTING THE WRIT

The petitioners — six Philadelphia police detectives — who were convicted of conspiracy in this case were, throughout the period in question, working together in their official capacities to investigate and solve multiple firebombing murders. Their associations with each other and the similarity in their activities were both lawful and reasonable, as distinguished from those situations where alleged conspirators have no reason to associate "but for" unlawful purposes. In such circumstances, the need to meticulously scrutinize the record, given the distinct possibility that the guilt of defendants will be determined, not on an individual basis, but on the basis of proof of lawful common conduct and association, is greatly increased. Yet, both the verdict and the appellate decision below permit a finder of fact to infer the existence of a single conspiratorial agreement solely from evidence that the defendant-police officers were jointly engaged in the proper execution of their duties.

As a result, this petition raises substantial questions in the ever troublesome area of criminal conspiracy in that the convictions of petitioners under a one count charge of conspiracy, on the basis of the unsubstantiated and improper evidence in this case, and the subsequent affirmance of those convictions by the Third Circuit, demonstrate the substantial degree of uncertainty which exists among the lower courts in the conspiracy area and the gross inconsistencies and inequities which have thereby resulted. It is apparent that little attention is being paid by either courts or prosecutors to Mr. Justice Frankfurter's admonition that:

> ". . . the concept of conspiracy is not an invitation to circumvent the safeguards in the prosecution of crime which are the special boast of our democratic society by making it a device to establish

guilt, not on the basis of personal responsibility, but by association. . . ." *Nye & Nissen v. United States*, 336 U.S. 613, 626 (1949) (dissenting opinion).

The instant decision has effectively resulted in the abolition of those principal elements which serve to distinguish the crime of conspiracy from substantive offenses: the existence of a conspiratorial agreement and a culpable state of mind, by permitting a jury to infer the presence of these elements solely from conduct which is neither culpable nor incriminatory.

In complete disregard of the basic tenet that a court must demand the highest standard of proof in criminal conspiracy cases based on circumstantial evidence, this case allows convictions to stand in the absence of such proof and solely on the basis of alleged, subsequent unlawful conduct by some individuals who, aside from their occupations, are not shown to have had any connection with each other.[3]

Additionally, as a result of the government's decision to prosecute on a single conspiracy theory, evidence highly prejudicial to petitioners was erroneously introduced at trial, a fatal variance occurred, and petitioners were clearly denied substantial rights. The trial errors were further compounded by the failure of the

3. Although this Court has generally refused to grant petitions for writs of certiorari, in cases raising sufficiency of evidence questions, it is submitted that the government's unjustifiable and improper employment of a criminal conspiracy statute in the prosecution of police officers in the instant case, and the impact which the decision of the Court of Appeals in this matter will surely have both on these defendants as well as on police conduct throughout the Nation, require careful consideration by this Court. This Court itself has, on numerous occasions, recognized that "a claim that a conviction is based on a record lacking any evidence relevant to crucial elements of the offense is a claim with serious constitutional overtones." *Anderson v. United States*, 417 U.S. 211, 223n. 12 (1974); *Johnson v. Florida*, 391 U.S. 596 (1968); *Thompson v. Louisville*, 362 U.S. 199 (1960).

Court of Appeals to review the record with the necessary scrutiny and by the appellate court's formulation and employment of a single conspiracy theory which was so overly broad that it effectively obviated the proper standards of review established by this Court in the criminal conspiracy area. Under the principles established by this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946), reversal of the convictions is required.

The indivious impact which the rulings will have upon future conspiracy prosecutions is patently obvious. As such, this case illustrates, in the most literal sense, the dangers inherent in conspiracy prosecutions which Mr. Justice Jackson warned against in *Krulewitch v. United States*, 336 U.S. 440, 449 (1949), in that no evidence, either direct or circumstantial, was presented to establish either the necessary linkage or the requisite state of mind sufficient to sustain a criminal conspiracy conviction. For this reason, review by this Court is imperative.

Finally, as discussed at Point III, *infra*, the government, by granting immunity to government witnesses solely for cross examination purposes upon completion of their direct testimony, patently violated the provisions of the federal immunity statutes by employing its immunity powers to protect prior testimony and not, as required by statute, to obtain testimony or information in which it had any interest from these witnesses. In doing so, the government substantially prejudiced the rights of petitioners to fully and properly cross examine these witnesses and permitted the jury to apply varying standards of credibility to the direct and cross examination testimony of these same witnesses. For this additional reason, review by this Court is required.

I. NO EVIDENCE, EITHER DIRECT OR CIRCUMSTANTIAL, OF THE TWO PRIMARY ELEMENTS REQUIRED TO ESTABLISH A CONSPIRACY: A CRIMINAL AGREEMENT AMONG ALL PETITIONERS AND A CULPABLE STATE OF MIND AS TO EACH PETITIONER, WAS PRESENTED IN THIS CASE.

The essence of the crime of conspiracy is the criminal agreement itself. Without an agreement, there is no conspiracy, although, absent direct evidence of such an agreement, the jury is permitted to infer the unlawful agreement from the circumstances of the case. *E.g., Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977). However, this Court has emphasized repeatedly that similar or common actions or aiding and abetting are not the equivalent of an unlawful agreement and do not necessarily constitute conspiratorial criminal agreements. *See, e.g., Iannelli v. United States*, 420 U.S. 770 (1975); *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). In this case, the circumstantial evidence presented by the government to support the charged conspiracy indicated nothing more than that the defendant-police officers, as a group, were engaged in carrying out their prescribed duties and lawful functions in the course of their employment. The non-incriminatory nature of this proof is self-evident; the common nature of the overall conduct of the defendants arose as a matter of course, out of their professional responsibilities, and no additional evidence whatsoever provided the quantum of proof necessary to establish the existence of the requisite agreement. Absent such independent proof of an agreement, the convictions cannot stand.

All of the petitioner-defendants were Philadelphia homicide detectives and were members of the same detective squad. All of them were assigned by their

superior officers to investigate the Santiago firebombing, (A. 2000a) and each of them, at different times during the first few hours of the investigation, commenced their activities on this investigation. All of them, in the normal course of their duties, were ultimately present at Philadelphia police headquarters and, again at the direction of their superiors, each of the defendants participated in the interrogation of witnesses to and suspects in the firebombing incident. Each was present at police headquarters for substantial periods of time throughout the 18 hour period in question, and each of the defendants, understandably and pursuant to departmental policy, was attempting to solve the crime by obtaining statements and evidence. During the course of the investigation, and again in accord with acceptable police practices and departmental requirements, each of the defendants reported the results of their individual activities to their superiors and to the other detectives then working on the case. (A. 2012a-2013a)

All of the above facts are apparent from the record and, in their totality, serve to demonstrate beyond question, a common course of conduct by the defendants throughout the period in question. As a result the primary elements from which a jury, in the typical criminal conspiracy case, would infer the existence of the requisite agreement: time, place, association, similarity of activities and interests, and commonality of purpose, are each present in this case. However, the presence of these various elements, in this instance, results not from any conspiratorial scheme or design or concerted action, and not from any unlawful gathering or suspicious conduct, but, to the contrary, arises directly and naturally out of the professional duties and responsibilities of each of the defendants. Thus, such proof cannot properly be employed to establish the existence of a conspiratorial agreement. In the absence of

additional proof upon which an inference of an agreement can be premised, it is clear that a guilty verdict cannot be sustained.

The government itself fully recognized this fatal absence of proof in its case. Having failed to obtain convictions on the substantive counts of the indictment, and recognizing that it could no longer rely upon the prosecutor's argument at trial that the "only issue in this case" is whether or not the beatings described by the Government witnesses actually took place,[4] the government, on appeal, fashioned a theory out of the mass of conflicting evidence presented at trial by its own witnesses to attempt to demonstrate the linkage necessary to establish the requisite agreement. The prosecution thereupon contended:

> "The common purpose and plan linking all six defendants to the conspiracy in the instant case was the intent to solve the same investigation through whatever means were necessary, including the violation of suspects' and witnesses' constitutional rights." (Appellee's Brief, at 2)

The Court of Appeals embraced this ingenious formulation wholeheartedly despite the total absence of evidence in the record from which an agreement could be inferred. After engaging in a brief discussion of burden of proof in this area, the Court stated:

> "Applying that measure of the sufficiency of circumstantial evidence of a conspiracy, there is more than ample evidence in this record of a common scheme or plan to solve a crime to the satisfaction of the conspirators by whatever means were necessary, including the violation of suspects' and witnesses' constitutional rights. All were engaged in a common endeavor. Each, the jury could find, beat one or more of the witnesses or suspects. Some moved from victim to victim. The false confession coerced from Wilkinson was tailored to fit the misinformation received from Garcia, and the false confession coerced from Hanley was tailored to fit that previously coerced from Wilkinson. All the victims were kept at the PAB until a "solution" satisfying the common purpose was obtained by virtue of Hanley's confession. When that was accomplished McCandless was released, although he had given a coerced confession inconsistent with Hanley's. The statements made by some participants disclosed knowledge of beatings by others, and thus disclosed that the conspirators were meeting together outside the interrogation rooms." (App. A, at 12)

4. The full quotation from the opening statement of the prosecutor reads:

"This is a case of did it happen, did the beatings alleged in the indictment occur?

"As the case progresses the Government will establish for you that that is the only issue in this case. Did the beatings described by the Government witnesses occur or didn't they? There is no other issue left in this case." (A. 12a)

It then concluded that "[t]he jury could, and did, find that the defendants were united in a common scheme of obtaining a satisfactory solution to the Santiago slayings by the illegal means of depriving suspects and witnesses of their Constitutional rights." (App. A, at 12). Once again, however, it can be safely stated that the government's position, as adopted by the Circuit Court, cannot be supported by the evidence at trial or the established law in this area.

Admittedly, the defendants were engaged in a common endeavor; their positions as police officers demanded that they act in cooperation with each other and with other persons involved in the investigation and that they engage in similar, prescribed activities in their attempts to solve the crime. Furthermore, for

the purpose of this discussion, and despite the failure of the jury to find that any of the defendants beat or verbally harassed one or more of the witnesses, it may also be assumed that some of the defendants were aware of or participated in one or more beatings. However, none of these facts established, with any degree of proof, that an overall agreement to deprive individuals of their civil rights, involving *each* of the defendants, ever came into existence, either expressly or by implication.[5]

For example, detectives Crown and Jones were closeted with Wilkinson from approximately 5:30 A.M. to 3 P.M. on the day in question (A.2668a, 2676a, 2698a). Even assuming, *arguendo*, that they physically abused Wilkinson during this period and, according to the prosecution's testimony, permitted or were aware that de-

5. Once it is recognized that none of the "common" activities or circumstances described in the preceding paragraphs are probative of the existence of a conspiracy among all defendants, additional, independent, non-hearsay evidence of this fact is required. However, much of the evidence introduced at trial and relied upon by the Court of Appeals to support its finding that "ample evidence" of the conspiracy was presented is patently inadmissible. Thus, testimony as to discussions of the case among unknown detectives which were overheard by one of the government's witnesses, as well as testimony as to numerous statements which were allegedly made by some police officers and which purportedly "disclosed knowledge of beatings by others," (App. A. at 12) is clearly inadmissible for the purpose of establishing the existence of the requisite conspiratorial agreement. Yet, the appellate court's Opinion specifically rests, in part, on these facts, in determining that the government's proof of a conspiracy was sufficient. The law, however, is clear that independent proof of the existence of the conspiracy must be presented prior to the receipt of such hearsay evidence. *E.g.*, *United States v. Cruz*, 536 F.2d 1264 (9th Cir. 1976); *United States v. Weber*, 437 F.2d 327 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); *see United States v. Nixon*, 418 U.S. 683, 701 (1974) (dicta). Accordingly, the use of statements of unidentified persons, who may or may not be co-conspirators, and who were never identified during the trial, to buttress the government's conspiracy contentions, was clearly improper.

tective McMillan, at one point, struck Wilkinson, not one shred of evidence in the record supports or even suggests that Crown or Jones were involved in or even aware of either the actions of any of the other defendants or the treatment of any other witnesses or suspects, at any point in time whatsoever. The further fact that the confession obtained from Wilkinson by Crown and Jones was subsequently delivered to defendants' superior officers and/or disseminated to other officers working on the case (A.2012a-2013a) and was presumably then employed by these other defendants, to use the language of the Court of Appeals, in tailoring subsequent confessions, again in no way links Crown or Jones to any alleged criminal activities of other detectives working on the case.[6]

Similarly, detective Curley, on the basis of witness Hanley's testimony, was present when Hanley was beaten (A. 700a-702a) and, according to other testimony, made certain intimidating statements to Wilkinson's wife, Christine. (A.574a) But the record is barren of any suggestion that Curley was involved in the interrogation of any other witness or that he physically or mentally abused any suspect. Indeed, this pattern repeats itself throughout this case and as to each of the petitioners. No evidence was presented to demostrate, even circumstantially, any unlawful commonality of purpose among the defendants, much less any express or tacit illegal understanding, of any nature, among the

6. Detective Murray, the officer who directed the firebombing investigation, testified that the supervisor in charge of the investigation reads all the interviews that are taken, directs the detectives to get additional information, and tells other detectives working on the case what one individual is saying that may apply to other persons who are being interviewed. (A. 2012a-2013a) This testimony is uncontradicted, fully explains the manner in which information passed among the detectives working on the case, and rebuts any suggestion that the similarities among statements can serve as a basis for inferring the existence of any conspiratorial agreement.

six of them.[7] Perhaps the evidence would support a finding, as is discussed more fully, *infra*, at Point II, that some or all of the defendants, in groups of two or three, did commit illegal acts in violation of 18 U.S.C. §241; perhaps, as appears more likely from the jury's verdict on the substantive counts, other unindicated officers committed the unlawful acts in the presence of

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7. The Court of Appeals, as set forth in the excerpt from its opinion quoted, *supra*, at 14-15, also pointed to evidence indicating that, of the eight persons who were interrogated, the five who were permitted to leave were kept at police headquarters until a satisfactory solution of the crime was achieved, that certain statements made by some of the defendants disclosed knowledge of other beatings, and that the conspirators were meeting together outside the interrogation rooms. All of this evidence was, in the view of the Court of Appeals, corroborative of the fact that all six of the defendants were engaged in a common plan and conspiracy to deprive persons of their rights.

Again, however, this evidence in no way supports the government's assertion that a conspiratorial agreement ever came into existence. Maintaining the presence of material witnesses in police headquarters is neither indicative of any concerted course of action nor unreasonable given the possibile need to obtain additional information from them. Furthermore, one of the witnesses, Christine Wilkinson, was not kept at headquarters throughout the entire period (A. 582a-583a), and it further appears that Nancy McCandless, another witness, was free to leave but remained at headquarters voluntarily until her husband's interrogation was concluded. (A. 1724a) Additionally, the fact that some of the defendants may have been aware of beatings in no way supports a finding that they consented to or were participants in these actions, nor does it suggest knowledge as to the reasons for or cause of the beatings. Mere knowledge of illegal acts, as this Court is well aware, does not, in itself, implicate one in a conspiracy. *See United States v. Morado*, 454 F.2d 167 (5th Cir.), *cert denied*, 406 U.S. 917 (1972). Finally, the alleged meetings among the so-called conspirators provides no foundation whatsoever for a finding of an agreement. The testimony upon which this finding is based (A. 1422a) did not identify *any* of the defendants as being either a party to or a subject of the conversations. In addition, the witness testifying to this meeting was in the next room when the meeting allegedly took place and merely overheard the remarks of persons whom she assumed were detectives.

some of the defendants. But, in any event, no single conspiracy involving all of the defendants has been shown.

None of the evidence relied upon by either the government in its argument to the Court of Appeals or by the appellate court itself can be used to support, directly or circumstantially, a finding that any single conspiratorial agreement among *all* of the defendants ever came into existence. The only bases upon which such a finding can be premised are those very actions and courses of conduct common to each of the defendants which were mandated by their positions and lawful duties and responsibilities as police detectives.

It is submitted that such non-incriminatory evidence of "common conduct" is not and cannot be held to be probative or suggestive of a conspiratorial agreement. It is well established that proof of the "agreement" upon which any conspiracy prosecution is premised must be established by clear and unequivocal evidence. *United States v. Fellabaum*, 408 F.2d 220 (7th Cir.), *cert. denied sub nom. Pyne v. United States*, 396 U.S. 818 (1969), *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano v. United States*, 379 U.S. 960 (1965). The federal courts have unanimously recognized that evidence in a conspiracy case must be analyzed "with meticulous care," *e.g., United States v. Bufalino*, 285 F.2d 408, 418 (2d Cir. 1960) (Lumbard, C.J.), and that any ambiguous evidence in such cases cannot be used to sustain a conviction. Indeed, the Eighth Circuit has properly stated that, where the government relies upon circumstantial evidence to establish the existence of the agreement, those circumstances must not only be "consistent with the guilt of defendants, but must be inconsistent with their innocence." *Shannabarger v. United States*, 99 F.2d 957, 961 (8th Cir. 1938). The Third Circuit itself has recognized that, in such instances, before a conspiratorial agreement can be established, it must be clear that "the activities. . . could

not have been carried on except as the result of a preconceived scheme or common understanding," *United States v. Barrow*, 363 F.2d 62, 64 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967) and this Court has recognized this same concept. *Glasser v. United States*, 315 U.S. 60 (1942).

In this case, not one piece of evidence relied upon by the prosecution and the appellate court to sustain the convictions is inconsistent with the innocence of the defendants as to the conspiracy charges lodged against them. And it is likewise clear that each of the defendants, given the crush of events during the period in question and the demands and responsibilities imposed upon them by their positions as police officers, acted independently and without any preconceived plan or understanding. To extract from the evidence here, any inference that such an unlawful agreement or common plan ever came into existence would be to stretch the limits of credulity and to permit convictions for conspiracy to stand solely on the basis of circumstance and innocent and lawful association. This Court should not sanction such a result and, for this reason alone, should grant certiorari.

Furthermore, not only was the evidence in this case insufficient to prove the existence of a conspiratorial agreement among petitioners, but it is equally apparent that the evidence cannot, either directly or inferentially, support a finding that some or all of the petitioners possessed the requisite state of mind to sustain a conviction for conspiracy.

Proof that any one officer physically abused a witness or suspect, absent additional proof to tie that defendant into the larger conspiracy, is plainly insufficient evidence upon which to base a conspiracy conviction. As the Second Circuit held in *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) in the context of a federal narcotics conspiracy prosecution, a single act is insufficient to support a conspiracy conviction, unless there is "independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself [is] one from which such knowledge may be inferred." *Id.* at 1342 (citations omitted). Again, as is discussed at length, *supra*, the evidence presented in this case to prove an agreement or to demonstrate knowledge of a larger conspiracy, to the effect that a more involved relationship existed among the defendants and that they had prior dealings with each other, the very types of evidence which, in the context of a narcotics, burglary or gambling conspiracy prosecution, might be directly probative of the requisite state of mind, does not prove that the defendants in this case intended to become a part of any larger conspiracy or to pursue goals other than those pursued on a single occasion. Nor, it should be noted, does such evidence prove or suggest that any one defendant, by engaging in unlawful conduct alone or with one or two others, had any reason to know that other police officers, in other places and at different times, would decide to abuse or harass a suspect under interrogation.

In other words, it is both reasonable and logical to conclude from the evidence that each alleged beating, if it took place, was an end in and of itself, and that the sole purpose of such action was to compel the particular witness to provide information of the crime. Once that goal was accomplished — for example, as in the case of defendants Crown and Jones — no further involvement in the investigation was required, and no inference can be drawn, from involvement in any single incident, that a larger conspiracy was necessary or appropriate. To permit a jury to infer knowledge of conspiracy from this type of proof in order to meet the scienter requirements of 18 U.S.C. §241 is to grossly distort both the facts of this case and the applicable law and to sanction the very "piling of inferences" that this

Court has previously condemned. *Direct Sales Co. v. United States, supra*, 319 U.S. at 711.

At bottom, the jury was permitted to infer the existence of a culpable state of mind as to all of the defendants from a series of actions and events which were both lawful and were required of defendants by their official positions. The government did not, and from the evidence presented, could not prove beyond a reasonable doubt that any of the defendants committed substantive criminal acts. Similarly, it could not demonstrate that any defendant intended to deprive an individual of his federal civil rights, as charged in the indictment, or to foster the overall goals of the charged criminal conspiracy. Absent such proof, these convictions likewise cannot stand.

II. THE FAILURE OF THE GOVERNMENT TO PROVE THE EXISTENCE OF A SINGLE CONSPIRACY AMONG ALL PETITIONERS AND THE FATAL VARIANCE WHICH RESULTED, COUPLED WITH THE THIRD CIRCUIT'S FAILURE TO EMPLOY PROPER STANDARDS OF REVIEW ON APPEAL AND ITS DISREGARD OF THIS COURT'S PRIOR DECISIONS IN THE CRIMINAL CONSPIRACY AREA, SUBSTANTIALLY PREJUDICED THE TRIAL AND APPELLATE RIGHTS OF PETITIONERS.

At best, the evidence presented by the Government in this case demonstrates not the existence of a single conspiracy involving all six of the petitioners, but, to the contrary, demonstrates multiple conspiracies, perhaps five or more in number, involving two or three of the defendants in each. The makeup of these individual conspiracies arguably tracks the substantive counts in the indictment, plus two or three other conspiracies in which various unidentified police officers were involved. By indicting on a single conspiracy charge, by compelling petitioners to present their defenses in a single trial, by sending the case to the jury on the basis of one all-encompassing conspiracy, and by introducing, as against all of the petitioners, evidence which was, in large part, totally unrelated to the alleged illegal activities with which any individual defendant was charged, substantial prejudice resulted and a fatal variance occurred. For this additional reason, these convictions cannot be permitted to stand and review by this Court is warranted.

It is well established that a variance between an indictment charging a single conspiracy and proof at trial of multiple conspiracies, such as existed in the instant case, is fatal if the variance affects the substantial rights of a defendant. *E.g., Berger v. United States*, 295 U.S. 78 (1935); *Kopald-Quinn & Co. v.*

United States, 101 F.2d 628 (5th Cir.), *cert. denied, sub nom. Ricebaum v. United States*, 307 U.S. 764 (1939). Similarly, it is clear that the substantial rights of a defendant are seriously jeopardized by the introduction of a mass of extraneous and confusing facts which occurs whenever several separate conspiracies are joined for trial. *Kotteakos v. United States*, 328 U.S. 750 (1946), a case which involved proof of eight separate conspiracies, is very clear on this point. In *Kotteakos*, Mr. Justice Rutledge found, from the very number of conspiracies involved, that the danger of transference of guilt from members of one conspiracy to members of other conspiracies was inherently prejudicial:

> "Here toleration went too far. We do not think that either Congress, when it enacted §269, or this Court, when deciding the *Berger* case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the *Berger* situation and for others where proof may not accord with exact specifications in indictments. Otherwise criminal conspirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. *The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.* Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not *Berger* marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case

> and this one." *Id.* at 773-74 (citations omitted) (emphasis added).

In this case too, toleration would go too far if the convictions are affirmed.

That the "inherent prejudice" sufficient to justify reversal which was found by Mr. Justice Rutledge in *Kotteakos* was present in petitioner's trial is evident from a review of the evidence. The testimony presented by the government accused some of the defendants and various unidentified officers, in most explicit terms, of inflicting prolonged and in some instances, brutal beatings on various witnesses and suspects and, further, that some officers, both defendants and other unidentified persons, made threats and used physical abuse to coerce statements and confessions from the suspects. The Court of Appeals classified these activities as "barbaric" and "misdirected." (App. A., at 4) However, there can be no justification for the introduction of evidence of the "barbaric" activities of one defendant or unindicted co-conspirator in the course of trial of another defendant who was neither involved in nor had knowledge of such actions. If this Court concludes, as it must from its review of this case, that no single conspiracy ever came into existence, then it is obvious, merely on the basis of the appellate court's characterization of the evidence, that severance was essential and that the existence of a fatal variance in this case requires reversal.

Similarly, and as discussed, *supra* at 16n.5, the government, by reason of its single conspiracy theory, was able to put before the jury hearsay evidence which would have been inadmissible if separate conspiracies had been charged or if individual trials, involving only two or three of the defendants, had been held. Additionally, and of equal significance, is the fact that the testimony of beatings and harassment, to the extent it related to officers who were neither identified nor named as defendants, would generally not have

been admissible had the smaller, two or three man conspiracies been tried separately.

The impact of this multitude of inadmissible evidence on the jury and the prejudice which inevitably resulted is apparent. The jury either acquitted or failed to reach a verdict as to the substantive counts in the indictment. This fact reflects a substantial doubt in the minds of some or all of the jurors concerning the guilt of some or all of the defendants as to the federal violations charged. However, it is clear that the jury was presented with evidence of some form of wrongdoing in that it heard testimony that some persons had been beaten and that some threats had been made, and further, that all of the defendants who were accused by the government of committing those wrongdoings had been involved in a common activity — the investigation of the firebombing — in one location during a single period of time.

Serious and difficult questions were thus raised as to the nature and scope of the alleged illegal conduct: whether one, two, four or all six of the defendants were involved in the illegal activities and whether some persons were intent on beating suspects to obtain a confession while others were simply acting out of rage, provocation or frustration but with no intent to violate a suspect's federal rights. Those distinctions, so critical to this case, were effectively lost in the muddle of evidence presented and the overall conspiracy charged. The teaching of Mr. Justice Jackson on the realities of conspiracy prosecutions is most apt in this circumstance:

> "There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch v. United States, supra*, 336 U.S. at 454 (concurring opinion.)

In light of the overwhelming evidence of common conduct introduced, applicable to all of the defendants as well as to various unindicted officers, and given the far-reaching definition of conspiracy applied by the appellate court in this case, any individual sitting at the defense table was bound to be swept up in the charged conspiracy. *See Nye & Nissen v. United States, supra*, 336 U.S. at 626 (Frankfurter, J., dissenting opinion). The ever-present danger of "guilt by association" was magnified as a result, and no cautionary instruction, no matter how concise, could possibly have been effective in the context of this proceeding. *See Krulewitch v. United States, supra*, 336 U.S. at 453. (Jackson, J. concurring opinion.)

Nevertheless, the appellate court, in a summary and mechanical fashion, rejected the applicability of this Court's decision in *Kotteakos* to the instant case, and, in turn, totally failed to address itself to or to resolve the prejudicial transference of evidence problem or the "guilt by assocation" issues which were identified by Mr. Justice Rutledge in *Kotteakos*. Instead, the Court strained to formulate a theory sufficient to sustain the government's approach to this prosecution. By defining the conspiracy to include all persons who acted pursuant to "a common scheme or plan to solve a crime . . . by whatever means were necessary," the Court of Appeals fashioned a theory which was so broad that it essentially obliterated any necessity for proof of an agreement and effectively mandated the conviction of all persons, related or unrelated to petitioners, who could have been charged with wrongdoing in this case. For example, had two police officers, acting on their own and without knowledge of petitioners' investigation, decided to beat a suspect in the firebombing case in order to obtain information of the crime, they could have been joined as defendants in this case and their convictions, given the theory advanced by the appellate court, would have been sustained even in the absence of additional evidence linking them to the other

defendants in the case.

To define the scope of the conspiracy, after the fact, to fit the evidence and to sustain conspiracy convictions is not a difficult task. In fact, by engaging in this patently improper exercise, the convictions of the defendants in *Kotteakos* could have been sustained, on a single conspiracy theory, if the Court had defined their conspiratorial conduct as a common scheme to make a profit from the sale of narcotics. Such ingenuity is not praiseworthy. It permits a reviewing court to ignore the inherently prejudicial nature of conspiracy prosecutions, to overlook evidence of the existence of multiple conspiracies and the possibility of transference of guilt among defendants, and to avoid the careful scrutiny of the record, as to each defendant, which is required in all criminal conspiracy prosecutions. *See United States v. Bufalino, supra*, 285 F.2d at 418. As such, it constitutes a blatant perversion of the teachings of *Kotteakos* and its progeny, and should be vigorously rejected by this Court.

The failure of the Third Circuit, in this instance, to heed this Court's Opinion in *Kotteakos* exemplifies the general uncertainty which exists among those lower courts that have dealt with variance issues in the conspiracy area. In the years since 1947, when this Court, in *Blumenthal v. United States*, 332 U.S. 539 (1947), last addressed itself, at any length, to the principles governing prejudicial variance, many of the lower federal courts have given mere lip service to the critical factor of transference of guilt in their review of conspiracy convictions. As a result, the *Kotteakos* decision has been severely limited to its facts, *see United States v. Morado, supra*, 454 F.2d at 171, and various rationales have been advanced to avoid application of the principles set down by Mr. Justice Rutledge in his Opinion. In the instant case, the Third Circuit ignored the variance problem altogether by straining to define the conduct of the conspirators so as to retain a single

conspiracy theory. Other courts have held that, despite the existence of a variance between indictment and proof, a defendant in a single conspiracy case is not prejudiced and his conviction can be sustained if the evidence, without more, would permit a jury to conclude that that defendant was guilty of membership in one of the multiple conspiracies proven at trial. *See United States v. Wayman*, 510 F.2d 1020 (5th Cir.), *cert. denied sub nom. Moore v. United States*, 423 U.S. 846 (1975); *Jolley v. United States*, 232 F.2d 83 (5th Cir. 1956). This latter view has been adopted in spite of this Court's assertion in *Kotteakos* "[t]hat conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of §269." *Kotteakos v. United States, supra*, 328 U.S. at 776. Indeed, even those courts which have applied the *Kotteakos* guidelines in reversing conspiracy convictions have frequently disregarded the theoretical underpinnings of that decision and have premised their decisions solely on the numbers of defendants or conspiracies which were joined together in one indictment and trial. *See, e.g., Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); *Daily v. United States*, 282 F.2d 818 (9th Cir. 1960); *Brooks v. United States*, 164 F.2d 142 (5th Cir. 1947).

Therefore, it is submitted that it is both necessary and appropriate for this Court to clarify the standards which are being employed, both by the government and by the courts, in the processing and handling of conspiracy cases and to review the difficult problems of proof, variance, and prejudice arising out of the haphazard joinder of multiple conspiracy-multiple defendant cases in a single prosecution. Judicial perceptions of fairness and due process within the criminal process have been markedly altered over the past decades. Nevertheless, the government has continued to institute conspiracy prosecutions at a rapid rate, in total disregard of the dangers and attendant unfairness inherent in such cases. As a result of these abuses,

innumerable defendants, including petitioners herein, are being denied their most basic rights to a fair trial and full and complete review of their convictions. The *Kotteakos* decision has continuing vitality; however, the mere fact that this Court has not seen fit to reexamine and reaffirm the ruling and rationale set forth in that case for over three decades has resulted in the inequities and inconsistencies present today in conspiracy prosecutions throughout the country. These issues clearly require review at this time. Given the nature of the evidence and the subject matter of the instant case, as well as the patently improper fashion in which appellate review of the convictions below was carried out and the ramifications which the Third Circuit's decision will have on future conspiracy prosecutions, it is submitted that such review can best be achieved in the context of this case, and that, for this additional reason, certiorari should be granted.

III. IN GRANTING IMMUNITY TO TWO PROSECUTION WITNESSES UPON COMMENCEMENT OF THEIR CROSS-EXAMINATION TESTIMONY, THE GOVERNMENT VIOLATED BOTH THE PROVISIONS AND PURPOSE OF THE IMMUNITY STATUTE AND EMPLOYED A PROCEDURE WHICH SEVERELY PREJUDICED PETITIONERS' RIGHT TO A FAIR TRIAL.

A. The Grant of Immunity After Completion of the Direct Testimony of Two Government Witnesses, Solely for Cross-Examination is Violative of the Provisions and Purposes of the Federal Immunity Statutes.

Section 6003(a) of Title 18, United States Code, provides:

> "In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, *an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination*, such order to become effective as provided in section 6002 of this part." (emphasis added)

In this trial, the government deliberately misapplied and, thereby, violated the express provisions of the immunity statute on two separate occasions, by requesting and obtaining from the Court immunity

grants as to witnesses who had already completed their testimony on direct examination, solely for the purpose of protecting that direct testimony. The statute plainly does not authorize such usage and allows the grant of immunity only where the government requires affirmative assistance to obtain testimony or other information from a witness.[8]

Two of the government's witnesses, Ronald Hanley and Vincent Cuccinotta, were called to testify to the events which took place at police headquarters. Prior to calling them, the prosecutor was fully aware of the fact that both of these witnesses intended to invoke their fifth amendment rights if questioned as to the events relating to the firebombing incident, and had agreed to grant immunity to them if the need arose during their cross-examinations. (A.676a-686a; 1262a-1265a) Further, defense counsel made it clear,

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8. The general rule in the immunity area is that defendants have no standing to contest the propriety of grants of immunity to witnesses testifying against them, *see United States v. Lewis*, 456 F.2d 404 (3d Cir. 1972), and the government will surely argue this point in opposition to this petition. However, in this instance, both as to Section A and B of this Point III, objections are being made not to the propriety of the grant of immunity, but to the procedure employed by the government in requesting and employing grants of immunity given the clear language of the statute forbidding the grants that were provided in this case, and the prejudicial effect of that procedure on the presentation of petitioners' defense. The rights of the witnesses are not violated by this procedure. To the contrary, it is the rights of the petitioners to a full and fair trial and to confront witnesses testifying against them which is being infringed upon by the government's improper employment of the immunity grant. The substance of and basis for the grant is not being questioned; the manner in which the grant was employed and the prejudicial impact of those grants upon defendants' trial is the subject of this petition. In such circumstances, no one but the defendants themselves have any standing to or interest in obtaining review of the government's actions. To hold otherwise would be to leave petitioners defenseless to governmental misconduct during criminal proceedings.

prior to the commencement of direct testimony, that he intended to cross-examine on matters relating to the fire-bombing even if the government chose not to cover these areas on direct examination and the court indicated, at that same time, that, in its opinion, examination by defense counsel as to the firebombing was permissible. (A.684a-685a) Despite these facts, and despite the suggestion of the trial court that these witnesses be immunized prior to their direct testimony, (A.684a) the government refused to request grants of immunity until cross-examination commenced. And even when it did request and obtain the immunity grants, neither the government nor counsel to either of the witnesses made any showing to the court that the forthcoming testimony would, in fact, be incriminatory. (A. 743a-755a)

The federal immunity laws are to be strictly construed. *E.g., United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974); *Ellis v. United States*, 416 F.2d 791, 797 (D.C. Cir. 1969). A plain reading of the statutory language does not permit the government to use immunity grants as shields to protect previously obtained evidence or to employ these powers in a fashion which will detrimentally impact upon the sixth amendment rights of criminal defendants to full and complete cross-examination and a fair trial.

In this case, the government plainly had no interest whatsoever in the substance of the cross-examination testimony of either witness. However, in order to avoid a successful motion to strike and a subsequent declaration of a mistrial, the prosecution granted immunity to these witnesses, despite its declared lack of interest in their cross-examination testimony. Indeed, the prosecutor specifically stated that the sole reason for the grant of immunity was to protect the direct testimony and to "safeguard" the court against any motion to strike that direct testimony. (A.685a) Petitioners were thereby denied their rights to

have the direct testimony excluded if the witnesses invoked their fifth amendment rights, and were further prejudiced in their right to a fair trial and to confront witnesses against them, as is more fully discussed, *infra* at 35. To the extent that the government required information from those witnesses, it had been fully elicited and presented to the jury during the direct examination. Nothing in the witnesses' cross-examination testimony would advance the prosecution's case or lead to the discovery of relevant information. In fact, the particular areas of questioning which purportedly necessitated the grants of immunity were not even the subject of the witnesses' direct testimony.

No reasonable reading of the immunity statute would permit the government to impede a criminal defendant's exercise of his rights during trial by granting immunity to a witness in such a situation. Immunity was given not for the purpose of compelling forthcoming testimony or advancing any governmental interest, but solely to protect previously obtained testimony. The immunity powers were, in this case, used solely as a shield, and not, as intended by the legislature, as a vehicle to advance the investigation and prosecution of the case. And although petitioners are unaware of prior federal or state cases in which government prosecutors have attempted to employ the "powerful executive implement" of immunity, *In Re Daley*, 549 F.2d 469, 480 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977), in such a manner, it is clear that the federal immunity statutes were neither designed nor intended to be used in this fashion.

Congress enacted the immunity statutes in order to advance the government's strong interest in compelling testimony, *United States v. Bryan*, 339 U.S. 323, 338 (1950), and to provide a means for prosecutors to obtain testimony in order to investigate and prosecute criminal activity. *Kastigar v. United States*, 406 U.S. 441, 446 (1972); *In re Daley, supra*, 549 F.2d at 478-79. At no point in time has Congress or any court ever

stated or suggested that the government may employ these same powers to protect testimony which has previously been received into evidence or to compel testimony or evidence in which it clearly had no interest, and nothing in either the statute itself or its legislative history, 1970 U.S. Code Cong. & Ad. News 4007, provides any support whatsoever for the government's actions in this case. This Court should expressly condemn such tactics at this time and in this case.

B. The Procedure Employed by the Government in its Grants of Immunity to Two Government Witnesses Solely for Cross-Examination Purposes Substantially Prejudiced Petitioners' Right to a Fair Trial.

The effect on the jury of the government's grant of immunity to two government witnesses solely for the purposes of cross-examination, in that it permitted the jury to employ one standard of credibility in evaluating the non-immunized direct testimony of the witnesses and a totally different credibility standard in considering the immunized, cross-examination testimony of these same witnesses, was clearly prejudicial and constitutes plain error. While the testimony elicited by the government on direct examination was unencumbered by the increasingly complex questions of credibility which always surround testimony given under immunity, the jury was free to speculate on the effect of the immunity grants upon these same witnesses' cross-examination testimony. Beyond question, to permit a jury, as a direct result of governmental manipulation of grants of immunity, to attach a different standard of credibility to cross-examination testimony as compared to testimony presented by the government during direct, as was allowed in this case, is to gravely prejudice the rights of those defendants who are to be judged on the basis of this very evidence.

It is axiomatic that testimony given under a grant of immunity must "be examined by the jury . . . with

greater care than that of an ordinary witness." The trial court so charged in this case. (A.2973a) This additional test of credibility causes no prejudice to a defendant where the immunity grant applies both to the direct and cross-examination testimony of the immunized witness. However, where, as in this case, the government requests and obtains grants of immunity only after the direct examination has concluded, and only for the purpose of defense cross-examination, the jury is invited to apply two different standards in evaluating the testimony of the same witness. The result of such a procedure is *per se* prejudicial to the rights of the defendants against whom this testimony is presented.

Thus, in this case, the jury was permitted to conclude that the grant of immunity enhanced the credibility of the witness and of his cross-examination testimony. In that instance, the impact on the jury of the entire cross-examination process would be dulled and any inconsistencies or inaccuracies brought out by that examination, given the jury's predeliction to accept the witness' testimony, would be substantially or completely disregarded. On the other hand, the jury could have concluded that the credibility of the witness or the reliability of his testimony on cross-examination was diminished as a result of the grant of immunity. In that instance, any testimony elicited on cross-examination which would tend to be beneficial to the defense would be substantially or totally discounted by the jury without in any way affecting the direct testimony of that same witness which was given prior to the grant of immunity.

In either case, the defense is placed in a no-win situation. Either the reliability and significance of any admissions, inconsistencies or other testimony elicited by cross-examination would be diminished or the credibility and importance of that same witness' testimony would be further enhanced, all as a result of the

government's decision to grant immunity only upon the commencement of cross-examination by the defense. The inescapable effect of permitting the prosecution to employ these tactics, in this case, was to substantially prejudice the defendant's ability to present their defense or to succeed in their attempts to demonstrate the falsity of the testimony of two extremely critical government witnesses. Such a procedure constitutes clear grounds for reversal.

The instructions of the Court, although correct in instances where the immunity powers of the government are employed properly and as to both the direct and cross examination portions of the witness' testimony, could not cure or otherwise protect against the inherent prejudice resulting from the prosecutor's unlawful request for immunity solely for defense cross examination. The Court, in its charge, told the jury that it could determine that, as a result of the grant of immunity, the testimony given thereunder was either "more reliable or less likely to be false" or that such testimony was less likely to be "truthful and accurate." (A.2974a) But the Court did not, and given the unprecedented nature of the government's activity, could not have been expected to frame and deliver a charge sufficient to cure the patent error caused by the split nature of the testimony. As a result of the government's improper conduct, the jury was compelled or otherwise given the opportunity to employ one set of standards in determining the credibility of the direct testimony and a completely different standard in measuring the reliability and credibility of that same witness' testimony on cross-examination. Such a double standard should not be tolerated and, beyond question, constitutes plain error under the facts of this case.

If the government had not granted immunity to these two witnesses and fifth amendment privileges had been invoked, defense motions to strike the direct testimony would surely have been granted, and a mo-

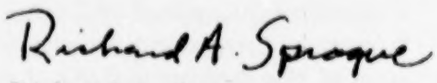
tion for mistrial would have been both appropriate and successful given the nature and significance of the direct testimony. Instead of taking this risk, the prosecutor freely chose to grant the immunity without consideration of the prejudicial effect which such actions would have on the defendants' cases.

The procedure employed herein could have and likely did have a substantial, prejudicial effect upon the opportunity of petitioners to present a full defense and to conduct a full and fair cross examination of their accusers. Such governmental chicanery within the criminal process should not be sanctioned by this Court.

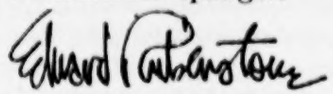
CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



Richard A. Sprague



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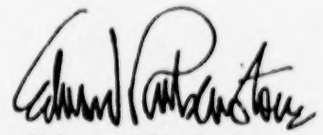
CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 1979, three true and correct copies of the Petition for Writ of Certiorari were personally served on the United States Attorney for the Eastern District of Pennsylvania, 3310 United States Courthouse, 601 Market Street, Philadelphia, PA 19106, and on the Solicitor General, Department of Justice, Washington, D.C. 20530.

I further certify that all parties required to be served have been served.



Edward H. Rubenstone

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1555, 78-1556, 78-1557, 78-1558, 78-1559 and 78-1560

UNITED STATES OF AMERICA

vs.

ELLIS, JOHN, *Appellant* in No. 78-1555
(D.C. Crim. No. 77-00428-01)

CARTY, JAMES, *Appellant* in No. 78-1556
(D.C. Crim. No. 77-00428-02)

CURLEY, JAMES, *Appellant* in No. 78-1557
(D.C. Crim. No. 77-00428-03)

JONES, WILLIAM, *Appellant* in No. 78-1558
(D.C. Crim. No. 77-00428-04)

CROWN, JAMES, *Appellant* in No. 78-1559
(D.C. Crim. No. 77-00428-05)

McMILLAN, ROSEBOROUGH, *Appellant* in No. 78-1560
(D.C. Crim. No. 77-00428-06)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 14, 1978 Before GIBBONS, VAN DUSEN and ROSENN, *Circuit Judges*

Filed March 13, 1979

OPINION OF THE COURT

GIBBONS, *Circuit Judge*

The appellants, six members of the Homicide Bureau of the Philadelphia Police Department, appeal from judgments of sentence following their conviction by a jury of conspiracy to deprive Philadelphia residents of federal civil rights in violation of 18 U.S.C. §241. We affirm.

I. THE FACTS

Sometime in the mid-1970s Radamas Santiago purchased a home at 4419 North 4th Street in the Feltonville section of Philadelphia. The Santiagos had difficulties with some of their new neighbors. In late September, 1975 the Santiago car was firebombed. A few days later, on October 5, 1975, at 3:25 a.m., while the Santiagos were asleep in their home, their house was firebombed. Radamas and one of his sons, Carlos, survived. Radamas' wife, three of his children, and Luis Caracini, a guest in the house, perished in the fire. The five appellants, along with other Philadelphia police officers, were assigned to investigate this arson murder.

Sleeping on the front porch of the Santiago home when the house was firebombed was Nelson Garcia, a fourteen year old Puerto Rican boy, a friend of the Santiagos. His hair aflame, Garcia fled from the house, looking for a fire alarm. Garcia saw one Robert Wilkinson in an automobile stopped near the Santiago home. Because Wilkinson was the first person he saw, Garcia assumed, contrary to the fact, that Wilkinson had started the fire. When the investigating Philadelphia police officers interviewed him, Garcia accused Wilkinson, who was promptly arrested. Admitted to Temple University Hospital, Garcia was questioned further, and elaborated that he had seen Wilkinson throw a bottle with a burning cloth onto the Santiago porch. Wilkinson was taken to the Philadelphia Police Administration Building (PAB), where he was questioned by several of the defendants. Eventually he signed a confession to a crime which he did not commit. Wilkinson was tried and convicted in the Philadelphia Common Pleas Court on five counts of murder. Garcia was the only alleged eye witness to testify, falsely, against him. Garcia had been influenced to do so by hearing that Wilkinson had confessed. Eventu-

ally the person who actually had thrown the firebomb, David McGinnis, acknowledged his guilt. Wilkinson's conviction was reversed, after he had spent fifteen months in jail.

An investigation by federal authorities into the efforts of these six Philadelphia police officers to procure the evidence which led to that conviction resulted in their indictment for conspiracy, under color of Pennsylvania law, to injure, oppress, threaten, and intimidate Robert Wilkinson, Ronald Hanley, David McGinnis, John McCandless, Vincent Cucinotta, Christine Wilkinson and Judith Cucinotta in the enjoyment and exercise of rights secured to them by the Constitution and laws of the United States. The named victims of the conspiracy are all persons whom the Philadelphia Police subjected to detention and coercive interrogation in their effort to build a case against Wilkinson. The evidence presented by the government suggests that the methods of investigation used by the defendant homicide detectives were as barbaric as they were misdirected. With respect to each victim of the conspiracy the jury could have found as outlined below.

A. *The Wilkinsons*

Wilkinson was twenty-five years old. He had attended special classes for slow learners throughout his education, which ended at age sixteen, and was essentially illiterate. He arrived at the PAB with his wife, Christine, shortly after 5:00 a.m. They were separated and both were detained. He was placed in a small windowless interrogation room, containing a bolted-down steel chair. Defendants Jones and Crown questioned him about the firebombing, and he denied having anything to do with it. He told the detectives that he and his wife had been out celebrating their anniversary, and that he first saw the fire upon returning from an errand to get cigarettes for her. He immediately drove around the corner and set off a fire alarm. After Wilkinson had gone over his statement four or five times, maintaining his innocence throughout, defendants Jones and Crown were joined in the interrogation room by defendant McMillan. The latter told Wilkinson that there were three or four counts of murder against him and that the police had an eyewitness. McMillan then punched Wilkinson in the chest. As Wilkinson fell to the floor from the blow, McMillan, who then weighed over three hundred pounds, slapped him across the side of the face with tremendous force. As McMillan left the room, he said to Jones and Crown that if they needed him he would return and deliver a punch which would stop Wilkinson's heart.

After McMillan's departure, Crown and Jones demanded that Wilkinson execute a form consenting to a polygraph test. Since he could not read, Wilkinson asked that his wife be allowed to read it. Crown and Jones refused, and threatened to take away the Wilkinsons' five month old child if he did not sign. Finding that threat credible, he signed.

Wilkinson was taken to a polygraph room in the basement of the PAB. Throughout the polygraph test he continued to maintain his innocence. After the test, however, Crown and Jones began a systematic beating in an effort to coerce a confession from Wilkinson which would confirm Garcia's false eyewitness identification. Although he continued to maintain his innocence during the early stages of the beating, eventually Wilkinson's resistance crumbled, and at 11:05 a.m. he signed a confession to a crime he did not commit.

In the confession Wilkinson supplied details which he could not have known. He said that the firebomb which he threw had been made from a Maxwell House coffee jar and a burning wick.[1] Wilkinson confessed that

1. Although Garcia was unable to describe the fire bomb when questioned by detectives at noon on October 5, ten days later he was able to describe it to virtually the exact measurements of a Maxwell House coffee jar.

one Ronald Hanley supplied the bomb, and that the instigation to throw it came from Hanley and two other men.

Corroboration of Wilkinson's severe beating was furnished by a prison doctor and a guard, who saw his injuries, by prison photographs of abrasions and cuts, and by neighbors who attended his arraignment in the courtroom at the PAB and observed that he could hardly walk without assistance.

B. *Hanley*

Ronald Hanley, the man whom Wilkinson's coerced confession implicated, was a Democratic Committeeman in the Santiagos' neighborhood. He was arrested and brought to the PAB with David McGinnis, a neighborhood youth, around 8:00 a.m. on October 5. Those arrests did not result from any information obtained from Garcia or Wilkinson, but from information obtained from a neighborhood resident implicating the pair in the firebombing of the Santiago automobile ten days earlier. Thus Hanley, like Wilkinson, came to the PAB as a prime suspect. When questioned, however, he initially denied knowledge about the firebombing of the house. He was then taken to the polygraph room for testing, and again maintained his innocence.

About 11:00 a.m. Hanley was returned from the polygraph area to an interrogation room where he was interrogated by defendants Ellis, Carty, Curley and an unidentified co-conspirator. Hanley was subjected to a prolonged series of beatings during which his nose was lacerated. In one instance a kick or punch caused him to lose control of his bowels. He was made to sit in his soiled clothing for close to an hour before being taken to a rest room and allowed to clean himself.[2] The interrogation followed the well known "Mutt and Jeff" routine in which one officer (Kuhar) would ask questions in a relatively friendly manner, and the others would, if he was unsuccessful, return and administer physical punishment. At 10:45 p.m. on October 5, almost fifteen hours after he had arrived at the PAB, Hanley signed a four page confession which tied in neatly with that obtained from Wilkinson some twelve hours earlier. To the extent that it admitted participation in the firebombing of the Santiago house, the confession was true. But it confirmed that Hanley had supplied the firebomb to Wilkinson. This was false, for Wilkinson was a non-participant and David McGinnis had actually thrown the bomb.[3]

2. While in the rest room he threw his undershorts in the trash. That action was to provide a corroborative detail, since several hours later warrants were issued for the seizure of the clothing of Hanley and Wilkinson in order to test for vapors of petroleum distillate. Wilkinson's, but not Hanley's underwear was seized.

Corroboration of Hanley's several beatings was supplied by prison photographs showing abrasions and cuts and by a prison doctor who opined that he had suffered a trauma to his chest which resulted in a spot on a lung x-ray taken shortly after he was jailed.

C. *McGinnis*

David McGinnis, too, arrived at the PAB as a prime suspect because of the information the police had received about the burning of the Santiago car. During his interrogation he was beaten by Carty and by McMillan. On October 5, he signed a confession that he had, with Hanley, firebombed the Santiago automobile. He did not, however, admit to any role in the firebombing of the Santiago home.

Many months later, after Wilkinson had been convicted of murder in Pennsylvania Court of Common

3. State charges against Hanley were dismissed because the Commonwealth was unable to move its case against him within 180 days of his arrest. Hanley was later indicted by a federal grand jury for violating 18 U.S.C. §§844(b), 371, 2(a) and 1510, 26 U.S.C. §§5861(f) and (d), and 42 U.S.C. §3631. His conviction was affirmed by this court. *United States v. Hanley*, No. 78-1309 (3d Cir. Dec. 14, 1978).

Pleas, McGinnis confessed. He pleaded guilty to federal charges growing out of the firebombing conspiracy and was sentenced to twenty-two years incarceration. McGinnis testified in the federal trial of Ronald Hanley, and in this trial, that he and Hanley had conspired to torch the Santiago home, and that he had actually thrown the bomb.

C. *The Cucinottas*

Vincent and Judith Cucinotta lived across the street from the Santiagos. They were brought to the PAB by a Philadelphia detective about noon on October 5, apparently because the police had information about altercations between members of the Santiago and Cucinotta households. They were separated immediately on their arrival. Vincent Cucinotta was questioned about gasoline he kept in his garage. Later he was polygraphed. Following the polygraph he was administered a series of beatings by a detective he believed was McMillan. Cucinotta's identification of McMillan was not positive, but McMillan was positively identified as a beater of Wilkinson and McGinnis, and was the one of two black detectives involved in the interrogation: the larger of the two.[4]

Judith Cucinotta was an eye witness to the firebombing. Looking out her window she had seen Hanley hand the bomb to McGinnis. She did not disclose this information to the police on October 5.[5] When she was separated from her husband she was interrogated by a detective about whether she and Nancy

4. Vincent Cucinotta was prosecuted with Ronald Hanley by the federal government for conspiracy to firebomb the Santiago home, but was found not guilty by the same jury which convicted Hanley.

5. She testified that her motives for concealment were the possible involvement of her husband, who had spoken to Hanley and McGinnis sometime prior to the firebombing, and fear of retaliation against her by Hanley and McGinnis.

McCandless had siphoned gasoline from a car. She maintained her own innocence, and denied any knowledge of who was involved. After being subjected to a polygraph test, she was threatened by a detective with being put in "State Road for 30 days where she would be held with a bunch of lezzies and queers." The detective also threatened to take her children away and place them in an orphanage with Puerto Ricans, who would kill them. She was also threatened with a visit to the morgue to look at the burned Santiago bodies. She never, on October 5, gave an incriminating statement, or one implicating Hanley and McGinnis. She was detained at the PAB until after Hanley gave a false statement implicating Wilkinson.

Judith Cucinotta provided corroboration of the abusive interrogation of two other victims, Wilkinson and McCandless, who she had occasion to see in a distressed condition at the PAB briefly. She also overheard, during her incarceration, conversations between detectives indicating that they were acting in concert in conducting the several interrogations.

F. *The McCandlesses*

John and Nancy McCandless were also neighbors of the Santiagos. At 10:30 a.m. on October 5, 1975, they were asked by three Philadelphia detectives to go to the PAB for about a half hour to give a formal statement. Upon arrival they were immediately separated and interrogated. John McCandless denied knowledge of the firebombing. When he persisted in that denial he was struck by an unidentified detective. Later that detective returned and said the bomb thrower had been apprehended, but McCandless was involved. When he again professed innocence, McCandless was struck. Defendant McMillan joined in the interrogation, accused McCandless of lying, and threatened to stop McCandless' heart by punching him in the chest. He also told McCandless "when I get done with you, I'm

going to work your old lady over and she won't hold up half as much as you did." McMillan left, and the first detective returned and administered more beatings, insisting that McCandless should confess his role in the firebombings. Unable to endure the pain, McCandless confessed to having aided Wilkinson in siphoning gasoline. This confession was false, in that McCandless had no involvement at all, and inconsistent with the confession which had been coerced from Hanley, in which Hanley said he supplied the gasoline to Wilkinson. The McCandlesses were kept at the PAB for approximately sixteen hours, until after Hanley's statement was obtained. Although he had confessed to participation, after Hanley's confession McCandless was released early in the morning of October 6, and was never charged.

As noted above, the beating of McCandless is corroborated by the testimony of Judith Cucinotta, who observed his appearance at the PAB.

II. APPELLANTS' CONTENTIONS

Appellants have filed a joint brief in which they contend: that there was insufficient evidence of a conspiracy in violation of 18 U.S.C. §241; that they were denied a fair trial because of prosecutorial misconduct; that the court erred in its charge and in its refusal to charge as requested; that the court erred in granting immunity to government witnesses; and that the indictment was duplicitous. We turn to those contentions.

A. *Sufficiency of the Evidence*

The defendants argue that the government's evidence was insufficient to support a jury verdict that they conspired. That evidence, they submit, tends to show no more than several individualized attempts to coerce separate witnesses into making incriminating statements. In their defense all the detectives took the position that the beatings referred to above never occurred. There was no testimony by a police informer detailing concert of action. Rather, the government's case on conspiracy was circumstantial. As we said in United States v. Barrow, 363 F.2d 62, 64 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967):

> The crime of conspiracy . . . is seldom susceptible of proof by direct evidence. Proof of the crime may rest as it frequently does, on indirect or circumstantial evidence. The existence of a conspiracy may be inferred from evidence of related facts and circumstances from which it appears, as a reasonable and logical inference, that the activities of the participants in the criminal venture could not have been carried on except as the result of a preconceived scheme or common understanding.

Applying that measure of the sufficiency of circumstantial evidence of a conspiracy, there is more than ample evidence in this record of a common scheme or plan to solve a crime to the satisfaction of the conspirators by whatever means were necessary, including the violation of suspects' and witnesses' constitutional rights. All were engaged in a common endeavor. Each, the jury could find, beat one or more of the witnesses or suspects. Some moved from victim to victim. The false confession coerced from Wilkinson was tailored to fit the misinformation received from Garcia, and the false confession coerced from Hanley was tailored to fit that previously coerced from Wilkinson. All the victims were kept at the PAB until a "solution" satisfying the common purpose was obtained by virtue of Hanley's confession. When that was accomplished McCandless was released, although he had given a coerced confession inconsistent with Hanley's. The statements made by some participants disclosed knowledge of beatings by others, and thus disclosed that the conspirators were meeting together outside the interrogation rooms.

Relying on *Kotteakos v. United States*, 328 U.S. 750 (1946), the defendants urge that, at best, there were separate conspiracies participated in by same but not all of the detectives, rather than the single conspiracy charged. We conclude, however, that the controlling precedents are Blumenthal v. United States, 332 U.S. 539 (1947), and United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972), cert. denied, 409 U.S. 914 (1972). The jury could, and did, find that the defendants were united in a common scheme of obtaining a satisfactory solution to the Santiago slayings by the illegal means of depriving suspects and witnesses of their Constitutional rights.

B. *Prosecutorial Misconduct*

The defendants urge that a new trial is required

because of remarks by the prosecutor in his opening speech, during the trial and in his closing argument.

Of ten references to the opening speech pressed on appeal, only four were objected to in the district court and pressed as grounds for a mistrial (46a). The court denied this motion, and instructed the jury, as he had before the prosecutor's opening statement, that that speech was not evidence, and that no conclusions should be drawn or opinions formed from it. Our examination of the opening statement convinces us that each of the matters objected to was a prior reference to anticipated testimony, or a reasonable form of descriptive argumentation. Perhaps the reference closest to marginal propriety is the sentence:

> Anyone who remembers Cardinal Mindszenty or American prisoners of war in Vietnam or Korea can remember what distortion of truth and right can occur. (25a).

This was said in the context of a discussion of the privilege against self-incrimination and of the charge that the constitutional right had been violated. While a more apt analogy than brainwashing by foreign powers might have been chosen, we agree with the district court that it certainly was not so inflammatory as to require a mistrial. The other claimed improprieties were even less so.

The references to remarks by the prosecutor during the trial are, as alleged errors, even less persuasive. The prosecutor at one point said that Wilkinson's "life was at stake." This is objected to because in 1977, after the events in question, Pennsylvania abolished the death penalty. When Wilkinson was tried he was liable to the death penalty. The prosecutor referred to Wilkinson's mental retardation, and this is alleged to be unsupported in the record. There was an offer of proof, not admitted, as to his mental capacity. We find the reference to be harmless at worst. Defendants object to a

reference to Exhibit G-36, an exhibit properly admitted in evidence. They also object to a reference to some of their number as a "goon squad." In this, the prosecutor merely quoted the witness, Ronald Hanley, who in turn quoted that description by Detective Kuhar of some of the defendants who had worked over Hanley. These and all the remarks complained of were either entirely proper, or if even marginally objectionable, clearly harmless.

Defendants charge that in closing argument the prosecutor (1) expressed his personal opinion as to their guilt, (2) expressed his personal opinion as to witness credibility, (3) made arguments on the basis of facts not in the record, (4) appealed to nonevidentiary reasons for convicting the defendants, and (5) improperly referred to Wilkinson's innocence of the murder charges on which he had been tried. Most parts of the closing argument now complained of were not objected to in the district court. To the extent that they were, we find that in context they were proper comments on the evidence or proper argument as to inferences which could be drawn therefrom.

C. *The Court's Charge*

In order to convict under 18 U.S.C. §241 the jury must find that a specific intent to violate constitutional rights was proved beyond a reasonable doubt. *United States v. Guest*, 383 U.S. 745, 753-54 (1966); *Screws v. United States*, 325 U.S. 91, 101 (1945). Discussing the substantive offenses under 18 U.S.C. §242 (Counts II, III and IV), the court charged:

> There must, however, be a specific intent to deprive a person of a federal right made definite by decisions or other rule of law, that is, either by the expressed terms of the Constitution or decisions interpreting the Constitution. An act done in open defiance or reckless disregard of a Constitutional

> requirement which has been made specific and definite, may be found to have been done willfully within the meaning of the statute.
>
> To find a defendant guilty, it is necessary for the jury to find that such defendant had not only a generally bad and evil purpose, but also had the purpose to deprive the victim of a Constitutional right. (2998a).

Defining a §241 conspiracy, the court charged:

> The Government must prove beyond a reasonable doubt that the purpose of the conspiracy was to violate the free exercise of a constitutional right as I have outlined that to you. (3011a).

Referring to overt acts in furtherance of the conspiracy, the court charged:

> [a]nd you must find that it was done for the purpose of depriving one or more of the alleged victims of their Constitutional rights. (3008a).

The defendants requested this additional instruction:

> The Defendants may not be convicted simply because they engage in a conspiracy and that one of the effects of the conspiracy was to violate the Civil rights of a particular complainant. The Government must show beyond a reasonable doubt that the *predominant purpose* of the conspiracy was to violate the exercise of a Constitutional right as I have outlined it to you. (emphasis supplied).

The effect of such a "predominant purpose" charge would be that if the jury found that the predominant purpose of the conspirators was the solution of the Santiago slayings, it could not convict even if it found a specific intent to deprive the suspects and witnesses of their constitutional rights. While Guest and Screws require such a specific intent, they do not require that the immediate intent to violate constitutional rights pre-

dominate over the ultimate purposes which that violation is designed to achieve. We hold that the court's charge on intent was proper and the requested charge improper.

The defendants also contend that the court improperly referred in its charge to the absence of Miranda warnings to suspects detained and interrogated for lengthy periods. No objection was made to this part of the charge, and thus we can consider it only as plain error. Fed. R. Crim. P. 52(b). The court charged:

> Although the right to arrest without a warrant and length of time that a person may be detained all implicate rights of constitutional dimensions, under the charges on this indictment and the basis on which the government is submitting the case to the jury, as I understand it, there is no contention that the arrests or the detention in and of themselves amounted to a violation of the United States Constitution.
>
> However, these are all matters of the overall surrounding circumstances which the jury may consider in determining whether there existed a conspiracy to violate the Constitutional rights of the various persons interrogated as charged in the indictment.
>
> Whether or not the police advised the suspects of their so-called Miranda rights and warnings about which there was considerable testimony falls into the same category; as well as whether the police denied persons access to an attorney or held them incommunicado or continued questioning them after persons refused to answer further questions. (3016-17a).

The testimony as to the lack of Miranda warnings and the length of detention was presented as part of the government's circumstantial evidence of the existence

of a conspiracy. In charging that the jury could consider these matters as part of the overall surrounding circumstances in determining whether the conspiracy existed, the trial court did not commit plain error. The charge made clear that the lack of Miranda warnings and the length of detention were not in and of themselves the constitutional violations charged in the indictment.

Defendants cite United States v. O'Dell, 462 F.2d 224 (6th Cir. 1972), for the proposition that it was plain error to instruct the jury that it might consider these factors in determining whether a conspiracy existed, in that this allowed materials outside the scope of the charge to be used by the jury in determining guilt or innocence of the defendants. However, the O'Dell court found that it was not error for the trial court to instruct a jury on the nature of state laws since the state law violations "could provide some evidence of specific intent to deprive persons of [their civil] rights." *Id.* at 231. The error committed by the trial judge in O'Dell was that he suggested to the jury that the state law provided the standard for determining what rights were protected by the federal statute in question. *Id.* No similar error occurred here.

D. *Immunization of Government Witnesses*

The defendants contend that the grant of immunity to two government witnesses was improper. That contention as a ground for reversal is foreclosed by our holding in United States v. Lewis, 456 F.2d 404, 410 (3d Cir. 1972), that defendants have no standing to contest the propriety of grants of immunity to witnesses testifying against them. They also contend that the court erred in its charge to the jury on the effect of an immunity grant upon a witness' credibility. The charge was substantially that given, and approved by this court, in United States v. Fineman, 434 F.Supp.

197, 204 (E.D.Pa. 1977), aff'd, No. 77-1866 (3d Cir. Feb. 1, 1978), and we approve it.

The court charged:

> The testimony of an immunized witness should be examined by the jury with care and with greater care than that of an ordinary witness.
>
> That is not to say that because testimony is given by an immunized witness that it should be completely rejected or completely accepted merely because that witness had been immunized.
>
> You may find that by reason of the immunity, the likelihood of it being truthful and accurate is lessened. On the other hand, you might conclude that the fact that the person can't be prosecuted for what he may then be testifying to would make his testimony more reliable or less likely to be false than if he had not been granted immunity.
>
> It's for you to determine what weight to give the testimony of all witnesses. (2973a-74a)

C. *Duplicity*

Defendants contend that Count I of the indictment, on which they were convicted, is duplicitous. That contention was not raised in the district court. Since the defect of duplicity could have been cured before the case was submitted to the jury, the contention should not be considered now. Fed. R. Crim. P. 12(b)(2). But, in any event, we do not find that Count I suffers from the defect alleged. A duplicitous indictment is one charging two separate crimes in the same count. *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975). In this case a single conspiracy to violate civil rights of several persons was charged.

III. CONCLUSION

The judgments of sentence will be affirmed.

Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1555/78-1560

UNITED STATES OF AMERICA

vs.

ELLIS, JOHN, Appellant in No. 78-1555
CARTY, JAMES, Appellant in No. 78-1556
CURLEY, JAMES, Appellant in No. 78-1557
JONES, WILLIAM, Appellant in No. 78-1558
CROWN, JAMES, Appellant in No. 78-1559
McMILLAN, ROSEBOROUGH, Appellant in No. 78-1560

(D.C. Criminal Nos. 77-00428-01-02-03-04-05 and 06)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, VAN DUSEN AND ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on December 14, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed April 24, 1978, be, and the same are hereby affirmed.

Attest:

THOMAS F. QUINN, *Clerk*

March 13, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1555, 78-1556, 78-1557, 78-1558, 78-1559 and 78-1560

UNITED STATES OF AMERICA

v.

ELLIS, JOHN, Appellant in No. 78-1555
(D.C. Crim. No. 77-00428-01)

CARTY, JAMES, Appellant in No. 78-1556
(D.C. Crim. No. 77-0048-02)

CURLEY, JAMES, Appellant in No. 78-1557
(D.C. Crim. No. 77-00428-03)

JONES, WILLIAM, Appellant in No. 78-1558
(D.C. Crim. No. 77-00428-04)

CROWN, JAMES, Appellant in No. 78-1559
(D.C. Crim. No. 77-00428-05)

McMILLAN, ROSEBOROUGH, Appellant in No. 78-1560
(D.C. Crim. No. 77-00428-06)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.*

By the Court,

JOHN J. GIBBONS, *Circuit Judge*

Dated: April 9, 1979

*Petitioner contends that the panel disregarded *United States v. Gallagher*, 576 F.2d 1028 (3d Cir. 1978). On the contrary that case sustains our disposition of the contentions respecting the prosecutor's arguments.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-935

JOHN ELLIS, et al., *Petitioners*,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 8, 1979.

/s/ WM. J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 27
day of April, 1979.